

***Testimony  
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***Information Policy, Census, and National Archives Subcommittee  
Of the Oversight and Government Reform Committee***

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2:00 p.m.***

***“Administration of the Freedom of Information Act: Current  
Trends”***

Good Afternoon, Chairman Clay, Ranking Member McHenry and Members of the Information Policy, Census, and National Archives Subcommittee, I appreciate the opportunity to address you today regarding current trends in the implementation of the Freedom of Information Act and ways for improving government transparency and accountability. I am here specifically to discuss the current status of FOIA administration at federal agencies, from requesters’ perspectives, and the importance of developing a culture of openness that transcends legislation and the whims of changing presidents. I hope I can provide some useful information based on empirical research in the field and the perceptions of requesters.

In my capacity as a former journalist, a current representative of journalists, and a scholar in freedom of information, I have found that accessing public records is often more about people than the law. If an agency encourages a culture of openness then the laws are applied; if not then requesters are forced to either go to court or use other strategies to get the records to which they are entitled. It is this human factor that led me and National Freedom of Information Coalition Executive Director Charles N. Davis to write the book, *The Art of Access: Strategies for Acquiring Public Records*. We felt a need for requesters to learn psychological strategies for getting records, since the laws

have not worked well in many cases. With that in mind, in this testimony I will, 1) outline the culture and attributes of openness, 2) convey my impressions of the current status of openness in federal agencies, and 3) provide recommendations for enhancing a culture of openness.

## **1. Cultures of Openness and Secrecy**

Bureaucracies inherently favor information control, and are hesitant to provide records freely for a variety of reasons, some justifiable (national security or personal privacy protection) and others not (to hide corruption or embarrassment).<sup>1</sup> A substantial amount of research demonstrates the prevalence of secrecy in government, particularly during the previous presidential administration.<sup>2</sup> Backlogs in FOIA requests are unreasonably long, with some requests pending decades.<sup>3</sup> Environmental journalists, for example, say that getting records under FOIA is so frustrating that they simply avoid the process altogether.<sup>4</sup> This might explain one reason for why journalists comprise only 5 percent of FOIA requests<sup>5</sup> – they seek information through other means because of the inability to acquire records in a timely manner through FOIA.

While we would like to think that laws work, the reality is that the public records process is arbitrary and broken, based on the whims of record custodians and officials who may or may not adhere to the law or respond in a timely fashion. At the state and local level, on average police agencies will illegally deny a valid records request for incident reports 71 percent of the time.<sup>6</sup> Florida court clerks interviewed for a study said they deny valid records requests if they feel the person doesn't deserve it.<sup>7</sup> This behavior exists at the federal level, as well. A study of records requests in Canada show that requests from journalists and politically sensitive requesters are more likely to be denied and delayed than requests from other people.<sup>8</sup> The FOIA process causes a wall of paranoia and mistrust between requester and agency,<sup>9</sup> sometimes resulting in a contest of wills and psychological warfare. This is not beneficial to agencies or requesters.

Organizational cultures of openness or secrecy are a product of people's attitudes. We know that FOIA officers at federal agencies are generally supportive of providing information to the public.<sup>10</sup> The problems arise with their superiors, as well as the people throughout an agency who might not favor disclosure of information. People who favor secrecy tend to be fearful, authoritarian, and trusting of those in authority.<sup>11</sup> Those who favor openness tend to be more educated, higher in self-esteem, skeptical, open to questioning, and high information seekers, particularly online.<sup>12</sup> Openness is a state of mind – grounded in one's psyche but also learned. People and organizations can develop an openness state of mind, but they have to want to do it.

Cultures of openness can change over time, for better or for worse, regardless of the agency or nation. For example, Sweden was the first country to adopt a federal FOIA law, including a federal ombudsman office, in 1766. The law was inspired by the China's

policies to provide citizen access to government information in the seventh century A.D.<sup>13</sup> Yet, within six years of Sweden's new law, an autocratic king came to power and rescinded the legislation. The law was re-instated in 1810, and is considered one of the best, if not the best, FOIAs in the world today.<sup>14</sup> We've seen this pendulum swing in the United States as well as presidents and cultural conditions cause agencies to vacillate between openness and secrecy. We, like Sweden, can find a stable culture of openness if we reject autocratic leadership and stay true to our values. Or, we can lose our way, like China, and gradually slide into an authoritarian, secretive society.

## **2. Current State of Openness**

During the past year we have witnessed improvement in openness in the United States compared to the previous eight years, at least on the surface. The strong statements of the Obama Administration have been refreshing, including the first-day executive order and memos declaring a new policy of transparency, the March 19, 2009, Holder memo, and the December Open Government Directive. Even partisan opposition can be beneficial, as Republicans have pressured Democrats to make the health care debate more transparent.

Despite some of the promising overtures by the Obama Administration, however, requesters remain skeptical and do not perceive significant change. Some of Obama's actions have not followed his words, such as his reluctance to release all White House e-mails. Requests still seem to drag on far too long. Redactions are often extreme and exemptions applied broadly instead of narrowly. Much of the data posted by agencies in response to the Open Government Directive is of little importance or interest to average citizens and the focus is on proactive dissemination of data online rather than improving the FOIA process. Legal scholars have been reluctant to declare a new era of transparency in the United States, grading the president's performance at a "C" or lower.<sup>15</sup>

One problem today in FOIA administration is that the concept of openness under the White House's definition is this: Flood the Web with data. While it is important to have as much government information online as possible, piling data on the Web does not improve the FOIA process nor does it lead to meaningful public understanding of government. Citizens and journalists want specific information, yet they are denied or delayed in a much worse way than if they attempt to get similar information at the state or local level. For example, jail logs and photos are typically public at the state level, but not under FOIA. State and local agencies typically respond to a request within five business days, depending on the state, not the 20 allowed for federal agencies under FOIA. Federal records that contain any mention of a live human being are routinely kept secret because of the warping of the Privacy Act. The Obama Administration continues to apply the state secrets privilege and the Presidential Records Act to hide information. It is easy to post a database of wind farm production rates on the Web but it takes true

courage and transparency to release e-mails of White House visitors or documents outlining the extent of the U.S. government spying on its own people.

However, it is perhaps unfair to expect immediate change. Cultures take years to develop, and the groundwork has been laid. OGIS will no doubt improve requesters' ability to better maneuver through agencies. The stated culture of openness might trickle down and permeate the federal government over time. Just this month, the Office of Management and Budget encouraged agencies to develop prizes for workers who promulgate openness.<sup>16</sup> That is promising, but it is not enough.

### **3. Recommendations: Sticks and Carrots**

Increasing a culture of openness among federal agencies is obtainable, in my opinion, over time through a combination of penalties (sticks) and incentives (carrots). First, the sticks:

- **Penalties for noncompliance.** We see at the state level the effectiveness of penalties for encouraging compliance with public record laws. Some of the most transparent states, such as Florida, Texas, and Washington state, have provisions for jail time or financial penalties against individuals and agencies that flagrantly violate the law.<sup>17</sup> Requesters who live in states that have no penalties for noncompliance express frustration and distrust toward their government.<sup>18</sup> There are no "FOIA police" to enforce lawbreakers, and most citizens cannot afford the time or money to sue. We know that the threat of litigation can be an effective method for agencies to comply with public records laws.<sup>19</sup> Federal FOIA should include financial and criminal penalties for officials and agencies that choose to act in bad faith.
- **Litigation assistance for requesters.** It is unreasonable to expect an average citizen to take the time and money to sue the federal government for information. A system should be created to provide requesters an avenue for timely and affordable redress of illegal denials. For example, some states give their public records ombudsman officers the authority to require agencies to make information public to a requester.<sup>20</sup> In Colombia (the second country to adopt a FOIA law, in 1888), a citizen can write a letter to an administrative tribunal for free if an agency denies access, usually getting a decision back within a week.<sup>21</sup> While those systems also have their problems, they attempt to provide assistance to the people who are at a disadvantage when challenging government.
- **Online accountability.** FOIA performance should be made clear on the new Open Government Dashboard. Anyone should be able to see in one place how all the agencies are complying with the law, including the volume of requests, backlogs, average processing time, percentage and number of records released and denied,

appeals and their outcome, etc. Quantifiable benchmarks should be set and then agencies graded, much like a restaurant inspection or school's standardized test scores. Is an agency passing, exceptional or a failing when it comes to FOIA?

The carrots:

- **More funding.** It is unfair to require agencies to be more transparent but not provide them the resources to do it. If Congress is going to impose requirements upon another branch of government the least it can do is provide it suitable resources for carrying out the mission.
- **Incentive programs.** Agencies that work diligently toward providing records should be rewarded with additional funding to further reduce backlogs.
- **Training of fundamental values.** Training of all officials, not just FOIA officers, on the fundamental reasons for FOIA and benefits of making information public (e.g., building public trust, facilitating innovation and economic growth, leading to improved government and accountability) would build a positive culture. Too often internal government training is focused just on FOIA officers and are led by attorneys who focus on the technical aspects of exemptions – how to keep information secret.

Ultimately, we as a nation should focus on creating a culture of openness in government and throughout society. Civics education is imperative because our government is a reflection of our people. Our children are taught to do well on standardized tests with little emphasis on social studies, creating a generation ignorant of the fundamental principles of democratic self-governance. We can have the brightest scientists and inventors, but if we as a people accept authoritarian leadership and secret government then we risk using our technological advances for destruction, not the common good. Open and accountable government should be valued by every American, whether they work in or out of government.

## Endnotes

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<sup>1</sup> See Thomas Susman, *Delay and the Freedom of Information Act: Senator Cornyn's legislative prescriptions*, 1 OPEN GOVERNMENT (2005), [www.opengov.org](http://www.opengov.org) for an explanation of different causes for delays in U.S. FOIA requests, including inadequate resources for processing requests, complexity of requests, the need for consulting with other agencies, little incentive to release, to mask embarrassment, to squash requests, particularly those from the media, and bureaucratic largesse. For seminal works on the importance of freedom of information and tension with other forces, see Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 LAW & SOC. INQUIRY 521 (1977), pages 609-610, who argues that “the First Amendment may require that journalists have access as a general matter to some records...” Also see HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* (Columbia University Press 1953); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (Harper 1948); Aimee C. Quinn, *Keeping the Citizenry Informed: Early Congressional Printing and 21<sup>st</sup> Century Information Policy*, 20 GOV'T INFO. Q. 281 (2003);

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<sup>2</sup> See Jane Kirtley, *Transparency and Accountability in a Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006); TED GUP, *NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE* (Doubleday 2007); Peter Herson, *Government Information Policy in a Time of Uncertainty and Change*, in *FEDERAL INFORMATION POLICIES IN THE 1990S: VIEWS AND PERSPECTIVES* (Peter Herson, Charles R. McClure & Harold C. Relyea eds., Ablex Publishing 1996); ALASDAIR ROBERTS, *BLACKED OUT: GOVERNMENT SECRECY IN THE INFORMATION AGE* (Cambridge 2006).

<sup>3</sup> See *Justice Delayed is Justice Denied* (2003) by The National Security Archives, which studied delays in access, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm>; *40 Years of FOIA, 20 Years of Delay* (2007), by The National Security Archives, which found the oldest pending FOIA requests going back more than 20 years, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm>; and *Secrecy in the Bush Administration* (2004), by Rep. Henry A. Waxman, provides a comprehensive examination of secrecy in the Bush Administration, [http://oversight.house.gov/features/secrecy\\_report/index.asp](http://oversight.house.gov/features/secrecy_report/index.asp). Also, see *Government Secrecy: Decisions Without Democracy* (2007), by David Banisar, sponsored by OpenTheGovernment.org and People for the American Way Foundation, shows how secrecy has increased since 9/11 and how that hurts democracy and good government. <http://www.openthegovernment.org/otg/govtsecrecy.pdf>; and *Secrecy Report Card* (2009) by OpenTheGovernment.org provides a great summary of the state of secrecy today at the federal level, [http://www.openthegovernment.org/otg/SecrecyRC\\_2009.pdf](http://www.openthegovernment.org/otg/SecrecyRC_2009.pdf)

<sup>4</sup> Robert McClure, *A Flawed Tool: SEJ Study Finds FOIA Little Used, Plagued by Delays*, 15 SE J. (Society of Environmental Journalists) 5 (2005), [http://www.sejarchive.org/site/sejournal/past/sej\\_fa05.pdf](http://www.sejarchive.org/site/sejournal/past/sej_fa05.pdf). Also, see Jennifer LaFleur, *The Lost Stories: How a Steady Stream of Laws, Regulations and Judicial Decisions have Eroded Reporting on Important Issues*, Reporters Committee for Freedom of the Press (2003), <http://www.rcfp.org/loststories/>; Charles Lewis, *Freedom of Information Under Attack in the Name of 'Homeland Security,' the Work of Journalists is Made Harder*, 56 NIEMAN REP. 84 (2002); Pete Weitzel, *Beware of Regulatory Creep as Secrecy Shrouds Records*, THE IRE J., Nov.-Dec. 2004, at 15; Ben Welsh, *Privacy, Security Block Access to Data*, UPLINK, Jan.-Feb. 2006, at 8.

<sup>5</sup> See *Few journalists use the federal Freedom of Information Act* (2001), the Heritage Foundation examined 2,285 federal FOIA requests to find that only 5 percent of requests of selected federal agencies in 2001 were submitted by journalists. Most submitted by lawyers and businesses, <http://www.heritage.org/Press/MediaCenter/FOIA.cfm>. Also, *Frequent filers: Businesses make FOIA their business* (2006), Coalition of Journalists for Open Government analyzed 6,439 FOIA requests in federal agencies to find that only 6 percent of requests are submitted by journalists. About two-thirds are submitted by commercial interests and the rests by citizens and non-profits. See summary at <http://www.spj.org/rrr.asp?ref=31&t=foia>.

<sup>6</sup> See David Cuillier, *Access America: A Meta-Analysis of 32 Access Audits* (Study presented at the Society of Professional Journalists national conference, Sept.10, 2004, New York); Also, similar results were reported in Emily Erickson, *What Statewide Audits Tell Us About Access, Privacy, and Political Culture*, presented at the Association for Education in Journalism & Mass Communication annual meeting, August 2008, Chicago.

<sup>7</sup> Michele Bush Kimball, *Law Enforcement Records Custodians' Decision-Making Behaviors in Response to Florida's Public Records Law*, 8 COMM. L. & POL'Y 313 (2003).

<sup>8</sup> Alasdair Roberts, *Administrative Discretion and the Access to Information Act: An 'Internal Law' on Open Government*, 45 CAN. PUB. ADMIN. 175 (2002); See also, Alasdair Roberts, *Spin Control and Freedom of Information: Lessons for the United Kingdom from Canada*, 83 PUB. ADMIN. 1 (2005).

<sup>9</sup> For an examination of the culture of FOIA in the U.S. and Poland, see Michael G. Powell, *The Emergence and Institutionalization of Regimes of Transparency and Anti-Corruption in Poland*, dissertation for Rice University, 2006, UMI Number 3216763.

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<sup>10</sup> SUZANNE J. PIOTROWSKI, GOVERNMENTAL TRANSPARENCY IN THE PATH OF ADMINISTRATIVE REFORM 89-96 (State University of New York 2007).

<sup>11</sup> See David Cuillier, *The Public's Concern for Privacy Invasion and its Relationship to Support for Press Access to Government Records*, NEWSPAPER RES. J., Fall 2004, at 95; Paul D. Driscoll, Sigman L. Splichal, Michael B. Salwen & Bruce Garrison, *Public Support for Access to Government Records: A National Survey*, in ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE, at 23 (Charles N. Davis & Sigmund L. Splichal eds., Iowa State University Press 2000); Joseph Phelps & Matthew D. Bunker, *Direct Marketers' Use of Public Records: Current Legal Environment and Outlook for the Future*, J. OF INTERACTIVE MARKETING, Winter 2001, at 33.

<sup>12</sup> See David Cuillier, *Access Attitudes: A Social Learning Approach to Examining Community Engagement and Support for Press Access to Government Records*, 85 JOURNALISM & MASS COMM. Q. 549 (2008); Suzanne J. Piotrowski & Gregg G. Van Ryzin, *Citizen Attitudes Toward Transparency in Local Government*, 37 AM.REV. OF PUB. ADMIN. 306 (2007); David Cuillier and Suzanne J. Piotrowski, *Internet Information Seeking and Its Relation to Support for Access to Government Records*, 26 GOVERNMENT INFORMATION QUARTERLY 441-449.

<sup>13</sup> For a historical examination of the "Freedom-of-Press and the Right-of-Access to Public Records Act," see Stephen Lambie, *Freedom of Information, a Finnish Clergyman's Gift to Democracy*, 97 FREEDOM OF INFORMATION REVIEW. 2-8 (February 2002), available online at [http://members.optusnet.com.au/~slamble/freedom\\_of\\_information.html#\\_ednref27](http://members.optusnet.com.au/~slamble/freedom_of_information.html#_ednref27).

<sup>14</sup> For a comparison of U.S. FOIA and Sweden's FOIA, see Stephen Lambie, *United States FOI laws are a poor model for statutes in other nations*, 106 FREEDOM OF INFORMATION REVIEW. 51-55 (August 2003); find more information at the Anders Chydenius Foundation Web site: [www.chydenius.net/](http://www.chydenius.net/).

<sup>15</sup> See, for example, an analysis of the Holder memo's weaknesses by former Department of Justice FOIA official Daniel J. Metcalfe, *Sunshine Not So Bright: FOIA Implementation Lags Behind*, 34 ADMINISTRATIVE & REGULATORY LAW NEWS.5-9 (2009). Also see Columbia Journalism Review's grading of the president's openness, at [http://www.cjr.org/transparency/report\\_card.php?page=all](http://www.cjr.org/transparency/report_card.php?page=all), and the latest assessment of openness by Amanda Becker, *Obama's Transparency Efforts Achieve Mixed Results*, THE NEWS MEDIA & THE LAW, 34, available at [http://www.rcfp.org/news/mag/34-1/obamasquos\\_transparency\\_efforts\\_achieve\\_mixed\\_results\\_12.html](http://www.rcfp.org/news/mag/34-1/obamasquos_transparency_efforts_achieve_mixed_results_12.html).

<sup>16</sup> See March 8, 2010, memo at [http://www.rcfp.org/newsitems/docs/20100311\\_125455\\_open\\_memo.pdf](http://www.rcfp.org/newsitems/docs/20100311_125455_open_memo.pdf).

<sup>17</sup> See an analysis of penalties for public records and open meeting laws in all 50 states: Adrianna C. Rodriguez and Laurence B. Alexander, *Punishment for Shade: An Analysis of Penalties and Remedies for Violations of Open Meetings Laws Across the Country*, presented at the Association for Education in Journalism and Mass Communication annual meeting, August 2009, Boston.

<sup>18</sup> See a survey of people who used the Indiana Public Access Counselor's Office, where 90 percent said they wish the office could levy fines against agencies who act in bad faith: Yunjuan Luo and Anthony L. Fargo, *Measuring Attitudes About the Indiana Public Access Counselor's Office: An Empirical Study*, [http://indianacog.org/files/PAC\\_final2.pdf](http://indianacog.org/files/PAC_final2.pdf)

<sup>19</sup> In two experiments in Arizona, agencies that received request letters threatening litigation resulted in three-quarters responding in contrast to only half for agencies that received friendly or neutral letters (also resulted in faster response, lower copy fees, and higher overall compliance). See David Cuillier, TESTING COMPLIANCE-GAINING THEORIES IN THE CONTEXT OF FREEDOM OF INFORMATION LAWS, to be presented at the International Communication Association meeting, June 23, 2010, Singapore.

<sup>20</sup> See a description of some of the mediation avenues in the states, at *Mediation Without Litigation* (2007) by Harry Hammitt for the National Freedom of Information Coalition, [http://www.nfoic.org/hammitt\\_mediation\\_without\\_litigation](http://www.nfoic.org/hammitt_mediation_without_litigation); and see an examination of the different models, including states like Utah that give strong powers to its public records commissions (forcing records to be disclosed and fining agencies), by Daxton "Chip" Stewart, *Managing Conflict Over Access: A Typology of Sunshine Law Dispute Resolution Systems*,

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presented at the Association for Education in Journalism and Mass Communication annual conference, 2008, Chicago.

<sup>21</sup> See a description of Colombia's open records legislation and constitutional protections, as well as other countries' laws, at <http://www.freedominfo.org/countries/colombia.htm>